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CAPITAL PUNISHMENT: FOR OR AGAINST?

Jan Gorecki*

THE DEATH PENALTY — A DEBATE. By *Ernest van den Haag* and *John Conrad*. New York: Plenum Press. 1983. Pp. xiv, 305. \$16.95.

Should capital punishment be abolished? The debate on this issue has been going on, in Europe and America, since the Enlightenment, and has produced a plethora of writings both for and against abolition. However, van den Haag and Conrad's book, *The Death Penalty*, is of an unusual kind: the exchange between the co-authors, one a retentionist and the other an abolitionist, is reproduced "live" within a single volume. This is a perceptive and entertaining exchange. Even though its participants do not alter their views in its course, they approach each other with open minds; they refine or even change at least some of their arguments under the impact of the discussion.¹

This format, however attractive, has its drawbacks. It makes it difficult to avoid repetitions. More importantly, it assumes that the adversaries will share a common, or at least corresponding, language. This correspondence is not always present in the discussions, however, because Conrad's and van den Haag's intellectual profiles differ. Conrad is a genuine empiricist who feels most comfortable when dealing with tangible data. He is open about his lack of axiological expertise,² and has no taste for speculation. "There is no room for the empiricist in such a discourse," he laments when debating the justification of criminal punishment (p. 20). Van den Haag, on the other hand, has little appetite for testing conjectures. He is a philosopher with an impressive polemical flair. This basic difference between the two causes some of their arguments to bypass each other.

This review analyzes van den Haag's and Conrad's most important arguments, and then turns to two fundamental problems with the book: its ahistorical approach and its flawed view of human motivation.

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1. See, e.g., van den Haag's rectification of his views on Thomas Jefferson's attitude toward mutilation (p. 52), and Conrad's more detailed elaboration of social and economic determinants of criminal behavior. Pp. 117-19, 123-26.

2. He notes at one point: "It is . . . certainly beyond my philosophical capabilities, to rehearse all the retributivist justifications" of criminal punishment. P. 22.

I. VAN DEN HAAG: THE RETENTIONIST ARGUMENTS

1. To support the retentionist stand, Professor van den Haag starts with a general question: what is the purpose — “[t]he intended effect” — of criminal punishment (p. 53)? The question is unclear: whose purpose does he have in mind? Does he mean, perhaps, the effects intended by lawmakers? In any assembly, the majority of legislators are most often either absent, inattentive, confused or divided. The effects intended by the American public? As the opinion polls imply, the general population has no uniform view on the issue. By specialists? Their views conflict with one another, just like Conrad’s and van den Haag’s. Thus, the question seems not empirical, but normative: what should be, in van den Haag’s view, the accepted purpose of criminal punishment?

His answer is ambiguous as well. First, he claims that “the primary purpose of legal punishment is to deter from crime” (p. 53). By deterrence he means here “general deterrence”; norms of criminal law address potential wrongdoers, that is, all of us, to prevent us from criminal behavior. Thus, the two other widely claimed goals of criminal punishment, incapacitation and rehabilitation, become secondary.

Deterrence thus understood denotes a number of psychological processes. As the first, van den Haag lists intimidation, which includes both the feeling of fear and a rational calculation of anticipated suffering. He stresses the calculation aspect most emphatically: “All the theory [of deterrence] says is that threats are likely to deter if the disadvantages threatened sufficiently outweigh the advantages perceived in the threatened act” (p. 142). A serious threat deters from crime, just as a high price deters from purchasing (p. 142). Most people “learn that crime does not pay and most of the time refrain from committing crimes” (p. 56). Those who do commit crimes “are quite rational” (p. 97); they make “[e]stimates of risk and estimates of attractiveness” of various crimes before committing them (p. 56).

Then, quite unexpectedly, van den Haag not only alters his stand, but contradicts himself: “Deterrence is not a calculation.” People “just feel that stealing is wrong That feeling, not a calculation, deters them — so much so that most people do not seriously consider stealing nor calculate when presented with an opportunity for any crime. . . . [T]his attitude . . . , internalized early on, [is] reinforced by the knowledge that stealing is punished” (p. 255). This theme of criminal punishment as moral reinforcement recurs several times. To punish means, for van den Haag, “to send a signal,” and so to defend “the moral rules expressed by the law” (p. 275). He accepts J.F. Stephen’s view that “a crime also tends to be regarded as wicked” because it is punished, and he goes so far as to claim that “conscience is not likely to be very effective . . . unless there is the accepted custom of legal punishment” (pp. 30-31).

Thus, it is difficult to know how van den Haag understands deterrence. Whatever his understanding, he treats criminal punishment as an implement of legal policy; it should be used to deter potential wrongdoing and thus to control crime. But, as we will soon see, he is not a teleologist pure and simple.

2. Whatever his precise conception of it, deterrence constitutes van den Haag's main argument in favor of the death penalty for the most abominable crimes, especially murder. He asks whether capital punishment deters murder more effectively than does life imprisonment, and he admits that we can hardly be sure. To answer the question in a publicly convincing way, experiments would have to be conducted, but "they face formidable obstacles" (p. 65). Past comparisons of abolitionist and retentionist states were usually based "on the legal availability or unavailability of the death penalty rather than on the presence or absence of executions and on their frequency" (p. 64). Of the more recent studies based on past statistics, such as those conducted by Isaac Ehrlich, his followers, and his adversaries, "none . . . seems conclusive," despite their sophistication (p. 65). It is "difficult, perhaps impossible to prove statistically — and just as hard to disprove — that the death penalty deters more . . . [than] alternative punishments do" (p. 67).

Having expressed this healthy skepticism, van den Haag suddenly discovers that we know the answer anyway: capital punishment deters better than life imprisonment. How do we know? From the common-sense perception of deterrence. By common sense, van den Haag seems to mean inferences drawn from ordinary experience; "our experience shows that the greater the threatened penalty, the more it deters," since "[o]ne is most deterred by what one fears most" (pp. 68-69). One fears capital punishment most: "99% of all prisoners under sentence of death prefer life in prison." From this "a reasonable conclusion can be drawn in favor of the superior deterrent effect of the death penalty" (p. 68).³ (Somewhat surprisingly, this conclusion now finds definitive support in a study held inconclusive a few chapters earlier; van den Haag now considers the conclusion "well proven" by Isaac Ehrlich (p. 128)). By this reasoning, crucial for van den Haag's argument, deterrence means intimidation. Deterrence as moral reinforcement, claimed with respect to the death penalty in an earlier chapter (pp. 30-31), has suddenly been forgotten.

3. Interestingly, in his rejoinder, Conrad makes a similar reversal. He admits, however reluctantly, that we do not know whether capital punishment deters better than life imprisonment. "Speculations on the proper amount of punishment" needed for optimal deterrence "are not open to conclusive scientific investigation." P. 87. That is why "the evidence will never be certain," p. 83, and why "it is unlikely" that the question of the superior deterrent force of capital punishment "will be successfully answered." P. 66. Then, apparently stimulated by the excitement of the debate, Conrad concludes: "*Why should we retain capital punishment when a life sentence in prison will serve the deterrent purpose at least as well?*" P. 293 (emphasis in original).

For those unconvinced about the superior deterrent power of capital punishment, van den Haag has yet another argument. He developed it earlier in a brilliant article⁴ — possibly the most ingenious retentionist statement ever made — and it proceeds roughly as follows. Granted, we do not know whether capital punishment deters murder better than any alternative penalty. If, in fact, it does not, and we nonetheless execute a murderer for the purpose of deterring others, the murderer unnecessarily loses his life due to our lack of knowledge. If, on the other hand, capital punishment does deter better, and we forego the execution, the innocent victims of those who might have been deterred will lose their lives. "I'd rather execute a man convicted of having murdered others," concludes van den Haag, "than . . . put the lives of innocents at risk" (p. 69).

3. In justifying the death penalty, van den Haag does not limit himself to teleological reasoning; he uses moral arguments as well. The difference between the two approaches is simple, although they are confused by many writers. Moral norms impose obligations, *e.g.*, "one should not kill." Teleological statements (also called "instrumental," "consequentialist," or, ambiguously, "utilitarian") tell us what to do to achieve a purpose, *e.g.*, "if one does not want to get punished, one should not kill."

Various legislative proposals, among them the suggestion to retain or to abolish the death penalty, can be made as teleological or moral recommendations, or both. Van den Haag combines both to justify his retentionist plea. I have described his teleology: to deter best, we should keep capital punishment. His moral justification is independent of his teleology: as sanction for the most abominable crimes, capital punishment is morally right, that is, just. Therefore we ought to keep it (pp. 297-98).

What does "just" punishment mean in this context? Van den Haag stipulates that it means "to punish the guilty according to what is deserved by the seriousness of the crime and the culpability of the person guilty of it" (p. 55). Thus, the just character of a given punishment depends upon an evaluation of the degree of guilt (and the seriousness of the crime) and an evaluation of what sanction is the right response to that degree. Van den Haag is not always clear about whose evaluation he has in mind. His own? The American people's? Or is he referring to some absolute standard? He eventually admits that, at least with respect to capital punishment, the evaluation is his own: "My evaluation leads me to believe that, *e.g.*, premeditated murder or treason . . . is so grave and horrible a crime . . . as to deserve nothing less than the death penalty" (p. 297).⁵ By his unqualified wording, van

4. Van den Haag, *On Deterrence and the Death Penalty*, 78 *ETHICS* 280 (1968).

5. Van den Haag uses a similar kind of evaluative judgment to justify rejecting torture as a form of punishment. Disclaimers notwithstanding, *see, e.g.*, pp. 76, 215, his stand on deterrence

den Haag seems to indicate that the death penalty should be mandatory.

But how can the death penalty be perceived as just?, ask the abolitionists. They use a long list of arguments, some of which refer to shocking facts. In particular, the abolitionists stress the enormous suffering and horror and humiliation of those executed; one need only visit death row or witness an execution to become aware of this and to admit the wrongfulness of the death penalty.

In rejoinder, van den Haag challenges the abolitionists' factual assertions. To be sure, execution does make "an important psychological difference" (p. 16): it increases the usual fear of death "because death becomes clearly foreseen and sudden," and, moreover, because the convict has been told by his fellow humans "that he is too depraved" to stay alive (p. 258). Nonetheless, the death penalty is, in van den Haag's view, not as big a deal as the abolitionists maintain.

First of all, "the death sentence does not deprive one of a life one would otherwise keep. We all die" (p. 15). Second, "[t]he dead neither wish nor fear; nor do they suffer Hence, it is hard to see how one can rationally fear *being* dead. One is afraid not of death but of dying But execution is probably less physically painful than most natural ways of dying. Dying by disease is usually more painful and often more humiliating. . . , " especially when one dies in a hospital (p. 16).

How can one react to these words? To avoid personal evaluative judgments, perhaps I should limit my reaction to a single issue: these arguments are hardly consistent with van den Haag's hatred of and contempt for murderers. There are common murderers around, as well as mass murderers — from Kolyma to Auschwitz to Kampala. But, following van den Haag's view, do they really deserve our hatred and contempt? After all, the deaths they inflict would have come to their victims anyway. And do they not spare the victims the pain and humiliation of prolonged disease in hospital beds?

II. CONRAD: THE ABOLITIONIST ARGUMENTS

1. Professor Conrad is at his strongest when employing his impressive experience and his humane concern to rebut retentionist claims. He is on weaker ground when speculating about the "philosophy" of punishment.

Why the speculation? Some liberals oppose not only capital punishment, but any criminal punishment; they would remove criminal law altogether. Conrad is a moderate liberal, and supports punishing

implies that the death penalty would be more effective if accompanied by torture. Nonetheless, van den Haag rejects tortures; they are unacceptable "because they are revolting." P. 181 n.7. Thus, torture arouses in him moral (and probably also aesthetic) repulsion.

wrongdoers, however reluctantly.⁶ But, because punishment brings about "infliction of pain or humiliation or deprivation on a fellow human being" (p. 19), he feels he must justify his stand. He provides "retributivism" as the main justification (p. 19).

Retributivists usually justify criminal sanctions by an ultimate moral norm they axiomatically accept: wrongdoing should be punished.⁷ This is not how Conrad argues. In his view, a modern society in order to function must provide for "external controls sustained by rewards and punishments," especially to create "the expectation that those who violate . . . laws will be punished according to their desert" (p. 18). Retribution brings about "atonement for a wrong done" and a subsequent "reconciliation of the criminal with the community," to the benefit of "order and solidarity" (pp. 26-28). If, on the other hand, crimes go unpunished, "[t]he moral order is eroded; the social bonds that make community life possible are loosened" (p. 22).⁸ Regardless of their validity, these propositions are purely teleological; we need criminal laws to preserve a well-working social order.⁹

From this teleological position, Conrad launches an attack on a purely moral justification of criminal punishment. He perceives Kant as the main proponent of this justification, and Kant's views become his target. For Kant, in Conrad's words, the question of justification "lay in an uncharacteristically superficial discussion of the problem. He flatly held that . . . the guilty criminal must be punished, and the moral order demands that the punishment be proportionate to the gravity of the offense. That kind of argument is nothing more than the insistence that punishment is right and requires no [further] justification" (pp. 20-21). This superficiality, as well as the impact of the Roman law (especially the Law of Twelve Tables), is said to have led Kant into acceptance of the *jus talionis* — the law of retaliation in kind (pp. 23-24). "As the Roman criminal law was the basis for the Prussian criminal law that governed the society in which Kant lived, it was natural that he should use it as his point of reference in developing his principles of justice" (p. 23).

There seem to be some misunderstandings here. There is no superficiality in the claim that moral axioms require no justification; no axioms do, because *ex definitione*, axioms end the chain of logical

6. "Are criminals to blame?" he asks, having commented about economic and social determinants of crime. His answer is: "We have no choice but to act as though they were." P. 125.

7. Thus, they claim, like van den Haag, that it is right to punish wrongdoers and wrong not to do so.

8. See also pp. 294-95. On Durkheim as the author of this argument, see p. 36.

9. In the same chapter Conrad speaks about retributivism in still another sense: retributivism as it appears within the criminal process. Once the wrongdoer has been found guilty, "[t]he crime itself justifies the punishment, and the punishment has no other purpose than to be imposed as the legal consequence of guilt" (p. 19). In other words, guilt justifies criminal conviction. This is obviously correct in any criminal court, but has little to do with Conrad's search for an external justification of criminal laws and the punishments they impose.

reduction. If Kant can be claimed to be an advocate of *jus talionis*, it is the *jus talionis* in some secondary sense only — he did not demand that punishment be truly in kind.¹⁰ Conrad treats the harshness of the Twelve Tables as characteristic of Roman criminal law (pp. 23, 267), but the Twelve Tables were the law of tribal Rome, at the outset of its history; in the late Republic and under the Principate, the criminal law became milder than that of various liberal democracies of today.¹¹ All of this is immaterial for Kant's Prussia anyway. In building their modern legal systems, Europeans borrowed the system of the Roman *private* law; they neither followed nor even knew the criminal law of Rome.

2. Having acknowledged the need for criminal sanctions, Conrad develops a long list of arguments against capital punishment. Many of them represent the abolitionist stock in trade since Bentham and Beccaria or at least since Rush and Rantoul. However — and this is a genuine accomplishment after two centuries of debate — some of Conrad's arguments, even though not entirely new, have been conceived from a fresh perspective or rearticulated and sharpened, and thus have gained a new importance.

His basic argument sounds simple: "My opposition to capital punishment begins with moral revulsion" (p. 11).¹² But his is not an autonomous morality. Conrad believes that the wrongfulness of the state's killing anyone, as well as any citizen's right to life, come from natural law (pp. 265-66, 268). To support his naturalist stand, he attacks legal positivists, among them van den Haag, for their claim that "rights have to be legislated" (p. 266). He blames legal positivism for helplessness in the face of governmental oppression; if we have only the rights granted by positive law, how can we challenge Nazi genocide? This pragmatic argument, even though instrumental at the Nürnberg trial, confuses law with ethics; after all, one can be a legal positivist and forcefully challenge totalitarian laws and cruelties on moral grounds. To be sure, following World War II, Gustav Radbruch, one of the greatest legal minds ever, concluded that legal positivists are more prone to succumb to totalitarian pressures than are natural law believers. This may be the case; however, this is an empirical claim which has never been tested.

The idea of the wrongfulness of executions finds support in Con-

10. Kant uses the expression to denote only "the Law of retribution." See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101 (1965).

11. Van den Haag also disregards this evolution. In his view, "The Romans thought that '*homo homini res sacra*' — every human being should be sacred to every other human being. To enforce the sacredness of human life, the Romans unflinchingly executed murderers." P. 262. Which Romans does he have in mind? The inhabitants of the tribal city-state or of the Rome of Augustus? The former did not believe that *homo homini res sacra*. The latter did not execute murderers.

12. See also pp. 187, 192, 196.

rad's belief in the intrinsically "human" nature of criminals. Most of those who have committed crimes display, through major parts of their lives, as much decency as anyone: "no man is always and only a murderer" (p. 10). Thus, by executing them, we destroy humans who largely are like and feel like ourselves.

This view comes from Conrad's intimate experience with criminals, acquired through many years of work in prison. That experience included interviewing prisoners on death row, giving psychological counseling, and witnessing an execution. As mentioned earlier, abolitionists consider this kind of experience crucial; the experience has been claimed to be so "brutally degrading" that if "those alone who have participated in an execution could vote on the death penalty, it would be abolished tomorrow."¹³ In the chapter opening the book Conrad briefly describes, with objectivity and poise, his experiences and those of others. For anyone unacquainted, the description provides important insight.

III. HISTORY AND MOTIVATION

1. History, especially the history of changing human motivation, constitutes the key to the problem of capital punishment in the United States and elsewhere. Unfortunately, historical analysis is rarely applied to criminal justice; it is also absent from the majority of writings on capital punishment. While there are various historical comments scattered throughout the book under discussion, it is essentially ahistorical.¹⁴

Capital punishment is a historical phenomenon. Accompanied by torture, it has been applied profusely and taken for granted in primitive societies, past and present.¹⁵ The development of culture brings a tendency toward decreasing the severity of criminal sanctions. This tendency has been most clearly displayed in the history of societies that have gone through long periods of cultural progress, especially Athens, Rome, and various countries of modern Europe.¹⁶

There is nothing mysterious about this tendency. At a low level of cultural development, the feeling of fear constitutes the main motiva-

13. UNITED STATES SENATE, TO ABOLISH THE DEATH PENALTY (Hearings before the Subcommittee on Criminal Laws and Procedures) 125 (1970) (statement of Louis J. West).

14. Only one chapter, "The Constitutional Question," pp. 157-200, has precise historical limitations — it clearly refers only to the United States. Nonetheless, the chapter does not fit the rest of the book well. Whereas the book asks the basic question whether capital punishment should be retained or abolished, this chapter deals largely with a different issue: who, under our constitutional system, has the authority to implement abolition, state (and federal) lawmakers or the Supreme Court?

15. See generally A. DIAMOND, *PRIMITIVE LAW PAST AND PRESENT* (1971).

16. For a more detailed account of this tendency, see J. GORECKI, *CAPITAL PUNISHMENT* 31-79 (1983). This idea of the declining harshness of criminal sanctions was first elaborated by Petrazycki and then, in a different manner, by Durkheim. See *id.* at 130-31 n.5.

tion against socially harmful behavior. That is why barbarians needed severe aversive learning and were provided with it, in a genuinely functional way, by the early criminal laws. On the other hand, the motivation of the civilized man differs from that of barbarians; gradually, under the impact of long-lasting social training, the fear of sanction is replaced by other stimuli which prevent harm to others. This does not mean that fear stops playing a role, but that the role becomes only auxiliary. Instead, moral experience, the experience of duty to do what is right and to avoid wrongdoing, becomes the new stimulus of dominant importance.

The growth and spread of moral aversion as the main motive against wrongdoing make the inherited severity of criminal penalties unnecessary; there is no need to employ the harshness of a prior era while, in the words of Chief Justice Warren, "the evolving standards of decency . . . mark the progress of a maturing society."¹⁷ The uselessness of severity is readily perceived by the society. The severity is thus experienced, by the people who largely have learned not to harm others, as the infliction of unnecessary suffering. That experience cannot but arouse the feeling that the inherited severity is unjust, and that sense of injustice generates, in turn, a spreading demand to make penalties more lenient. This demand accounts for the general tendency toward the declining severity of criminal law.

2. The tendency toward decreasing the severity of penalties has operated forcefully in the United States, and the abolitionist trend has been its major component. The struggle for abolition had various successes in the nineteenth and in the first half of the twentieth century,¹⁸ but it stopped short of total success. Only in the mid-1960's did complete abolition seem to be impending. The public mood was shifting in that direction, executions came to a standstill in 1967, and the abolitionists felt that their day was coming; they hoped, in particular, that the then activist Supreme Court would strike down the penalty. During the following decade, however, there came a major reversal (only tangentially observed by Conrad and van den Haag). In the wake of *Furman v. Georgia*,¹⁹ lawmakers in thirty-four states rushed to pass new statutes to protect their capital punishment statutes from constitutional challenge. And in the wake of *Gregg v. Georgia*,²⁰ not only has the death penalty been reaffirmed in the law books, but also, since 1977, executions have begun again.

This reversal can easily be explained. Abolitionist sentiment

17. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

18. In particular, several states abolished capital punishment, and all others reduced the lists of capital crimes. Moreover, in the retentionist states there was a steady transition from the mandatory to the discretionary system of death sentencing.

19. 408 U.S. 238 (1972).

20. 428 U.S. 153 (1976).

reached its peak in 1966, but it has undergone a steep decline since then. Among the general public, the proportion of advocates of punitive harshness, particularly those advocating the death penalty, grew dramatically.²¹ This new punitive mood has been caused by spreading anger about crime and fear of crime, that anger and fear having been generated by an actual rise in crime rates. Thus, casting about for a remedy against pervasive wrongdoing, the American public turned to the criminal justice system with demands for harshness and executions, and the system has been responsive to the public mood. This is exactly where Conrad and van den Haag differ most; van den Haag not only follows, but helps articulate the new punitive mood, whereas Conrad forcefully objects.

3. The current resort to harshness is a mistake. To be sure, looking to the criminal law for remedies to the growth of crime is an obvious option. But the effective use of that option calls for an understanding of how criminal law operates. Among barbarians, the law operates mainly by arousing fear, and thus it must be harsh. In a society on America's level of development, where moral aversion constitutes the main motive against wrongdoing, criminal punishment is most effective as moral reinforcement, that is, as an implement of moral learning. Interestingly, as indicated earlier, van den Haag accepts the notion of criminal punishment as moral reinforcement. However, he neither develops the notion nor brings it to its important conclusions.

The idea of using criminal punishment as a tool of moral learning is not new. It was hinted at long ago by Bentham, elaborated by Petrazyski, acknowledged by Justice Brandeis. How can the idea work? Modern psychology provides the answer.

We acquire our moral experiences in the process of social learning. The process operates in two ways: first, through persuasive communications from the society we live in as to what is right and wrong and, second, through reinforcement — rewards and punishments following, respectively, our merits and our wrongdoing. Legal norms may be most helpful in promoting this process. In particular, legal punishments, if perceived as just and certain, operate effectively in both ways. First, they work as persuasive communications; they tell us that prohibited behavior is wrong and should be avoided. Second, they operate as implements of vicarious instrumental learning; we witness, indirectly for the most part, punishments for wrongdoing, and our aversion to wrongdoing is reinforced much as if we were punished ourselves. These two processes — communication and reinforcement — converge to produce aversions having a peculiar emotive tone, a feeling of duty to avoid wrongdoing; this feeling standing alone consti-

21. See J. GORECKI, *supra* note 16, at 108-10.

tutes a powerful motivation.²²

There are two prerequisites for the effectiveness of this process, both of which I hinted at earlier: the punishments must be certain (or at least perceived as certain), and perceived as just. The former prerequisite constitutes a condition for any aversive instrumental learning; it has been clearly demonstrated, on humans and animals alike, that only punishments that are certain result in aversion and avoidance, whereas intermittent punishments reinforce the behavior sought to be punished.²³ The latter prerequisite means that criminal punishments must match the moral sentiment of the society, that is, they must be imposed for behavior widely perceived as wrong, they must be applied with the degree of severity widely considered as right, and they must be applied consistently, in accord with the principle of treating like cases alike. Only then can the society make clear to all its members that the punishments are being imposed for wrongdoing, thereby rendering those punishments persuasive as moral communications.²⁴

The criminal justice system in this country does not meet these two prerequisites. To be sure, perfect certainty of punishment would be both a utopian and dangerous idea; only an approximation of certainty is feasible. However, nothing resembling such an approximation is being achieved in the United States. The almost unbridled discretion on the part of those who administer criminal justice, especially courts, prosecutors, and police, results in widespread nonenforcement of the criminal laws. Thus, criminal punishment is not only intermittent, but it constitutes a very rare response to crime. Both Conrad and van den Haag are aware of this condition, and Conrad deplores it: "The contemplation of unpunished crimes is disturbing . . ." (p. 22).²⁵

Justice is also largely absent from the system. Again, unrestrained discretion is the major culprit, for it renders punishment arbitrary. This arbitrariness occurs at all stages of the criminal process, but it is most conspicuous in the context of plea bargaining — a practice which accounts for about ninety percent of all criminal convictions. Under a system of plea bargaining, lightening the sentence within discretionary

22. For a more detailed analysis of this psychological process see J. GORECKI, *supra* note 16, at 71-74, and J. GORECKI, *A THEORY OF CRIMINAL JUSTICE* 3-27 (1979).

23. This rather unexpected discovery has been explained by Abraham Amsel and others: the intermittently applied punishment becomes a classically conditioned cue for the impending, nonpunished instrumental acts. See Amsel, *Partial Reinforcement Effects on Vigor and Persistence*, in 1 *THE PSYCHOLOGY OF LEARNING AND MOTIVATION: ADVANCES IN RESEARCH AND THEORY* 1-65 (1967); Amsel, *Frustrative Nonreward in Partial Reinforcement and Discrimination Learning: Some Recent History and a Theoretical Extension*, 69 *PSYCH. REV.* 306 (1962).

24. It is clear that punishments that are perceived as unjust in this sense have no persuasive power. For instance, if a court punishes someone for paying debts, applies an extremely harsh measure for a petty encroachment, or selects for punishment only a member of an ethnic minority from among a large group of those proved to have committed an identical offense, no one will be persuaded that the behavior is being punished because it was wrong.

25. See also pp. 103, 119, 145.

boundaries does not result necessarily from a lesser degree of culpability or any other uniform principle, but depends largely on how all the participants have played the negotiating game. Dismissal of some of the multiple charges is often equally arbitrary. Reducing the charge results in applying an arbitrarily selected criminal norm that, on the facts of the particular case, may not have been violated at all. The sale of sentences for guilty pleas sounds like a cynical exchange deal rather than moral communication, and the resulting arbitrariness causes penalties to differ in like cases from case to case, judge to judge, and court to court. The basic requirement of justice — that of treating like cases alike — is gone, and thus cast aside is the just character of criminal dispositions along with their power to persuade us of what we should feel is wrong.

4. The practical implications of this analysis are clear: to make the system of criminal justice work, uncertainty and injustice in criminal punishments are to be eliminated. This means that those who run the system, in particular the judges, prosecutors, and police, must operate under an enforceable obligation to comply with the law. Consequently, the law itself, presently contorted by the overwhelming prevalence of arbitrary practices, must be readjusted to make the compliance feasible. All of this requires a major reform; a detailed discussion of the reform would, of course, exceed the limits of these comments. Implementing the reform would be complex and difficult, and would require a major political effort. There seems to be no other way, however, to deal effectively with the crime problem in America, and an effective policy is badly needed and increasingly demanded. Those demands, precipitated by the spreading fear and anger about crime, find expression in the changing public mood of the past fifteen years.

Unfortunately, this mood has not changed in the direction suggested by this essay. Anger, fear, and the resulting hatred of the wrongdoer do not necessarily stir one to undertake general moral education; rather, these emotions arouse the wish to deter strongly or to take revenge. Consequently, they spur requests for severe, rather than merely certain and just, punishments and, especially, for capital punishment. In this manner the angry and fearful reaction against the pervasiveness of crime in America has addressed the irrelevant themes of punitive harshness and capital punishment rather than the important issues of certainty and justice in all punishment. Conrad's words, spelled out in response to van den Haag's comments on deterrence, thus appear eminently wise:

[T]he resumption of capital punishment is . . . a needless distraction from the program that must be adopted . . . [What is needed is] the availability of fair and proportionate sanctions for all crimes. This . . . implies a commitment to a difficult and expensive program. Many politicians who wish to be seen as champions of law and order — without

going to the trouble and incurring the cost of a realistic program of legislation — correctly suppose that a vigorous support of capital punishment will convince the public that they are not “soft on crime.” This kind of humbug is the deceptive leadership that makes the control of contemporary crime so difficult. [P. 122.]

5. What is, from this historical perspective, the weight to be accorded Conrad and van den Haag’s debate? The answer depends on how one views the question. A debate can hardly be more important than the problem it deals with. From the viewpoint of the proper functioning of criminal justice in America, the problem of the death penalty is marginal; it is not the penalty’s presence or absence, but other reforms that are essential for effective crime control.

On the other hand, whether we send criminals to death or not presents a moral dilemma of the utmost importance, particularly in a society that has not yet opted finally for abolition. That is why, at least as long as the death penalty is not removed from our law books, the interest in the issue will be intense, and the debate between Conrad and van den Haag will remain a relevant and important contribution.